Tune Insurance Malaysia Bhd (formerly known as Orient Capital Assurance Bhd) & Anor v Messrs K Sila Dass & Partners

HIGH COURT (KUALA LUMPUR) — ORGINATING SUMMONS NO 24NCC(ARB)-26–05 OF 2014
HASNAH HASHIM J
27 MAY 2015

Arbitration — Award — Question of law — Master Policy and Certificate of Insurance — Fraud or embezzlement — Whether mandatory limit for claims exhausted — Interpretation of 'one claim' standard term clause — Findings by arbitrator that each claim ought to be accepted as separate claim — Whether arbitrator answered questions of law correctly — Whether award ought to be set aside

The defendant was a legal firm which had a branch office in Petaling Jaya ('the PJ branch'). One Manoharan was employed as the managing clerk at the PJ branch until it was closed on 31 March 2007. The plaintiffs were licensed insurers, who were the insurers of the Malaysian Bar Professional Indemnity Insurance Scheme ('PII Scheme') for the year of 2006 and 2007. The second plaintiff was the current insurer to the PII Scheme. Via contracts of insurance contained in a Master Policy and Certificate of Insurance ('COI') issued to the Malaysian Bar for and on behalf of its members, the plaintiffs agreed to provide the defendant with a PII Scheme for the years 2006 to 2009, to indemnify the defendant against civil liability for any claim arising from the defendant's legal practice. The COI for the years 2008/2009 contained terms to the same effect as those for the years 2006/2007 on the maximum amount that the defendant would be indemnified. Between July 2006 to May 2009, a total of 15 claims were made against the defendant relating to the embezzlement or fraud committed by Manoharan. The plaintiffs disputed 13 claims on the grounds that the said claims were related to the embezzlement by the same employee. Therefore, the claim was considered as 'one claim' in accordance with cl 36(k)(ii) of the COI 2006 and as such, the defendant had exhausted the mandatory limit for the year 2006. On the grounds that the plaintiffs had wrongfully repudiated liability on the remaining claims, the defendant instituted an arbitration proceeding pursuant to cl 25 of the COI 2006 against the plaintiffs. It was the defendant's contention that although the perpetrator was the same Manoharan, the fact remained that the fraud or embezzlement was committed on different parties, as such each claim ought to be considered and accepted as a separate claim. The arbitrator was of the view that it was not sufficient for there to be a separate unrelated individual acts of fraud or

embezzlement where the underlying cause or source may have been same or related. The actual fraud or embezzlement acts themselves must be related in order to satisfy the clause. The arbitrator's decision had resulted in the successful outcome of the defendant's claim against the plaintiffs. As such, the plaintiffs sought to refer to this court pursuant to s 42 of the Arbitration Act 2005 ('the AA') questions of law, which arose out of the said arbitration award. The defendant opposed the application contending that the questions posed were not questions of law but instead amounted to an attempt to review findings of fact and evidence made by the arbitrator.

Held, allowing the application with costs:

(1) The court is reluctant to intervene in arbitration awards. The cases in which the court exercises its powers of intervention are expressly restricted as provided in s 8 of the AA. As such, it is only in rare cases that the court will intervene in an arbitration award. As set out in the test in relation to s 42 of the AA, a clear error of law or misapplication of the law to the fact warrants a rectification of the law. This was a case where the rights of one of the parties had been substantially affected by the decision of the arbitrator. Therefore, the court was constrained to exercise its power to correct the clear errors of law arising (see paras 63–64).

(2) The arbitrator had made a finding of fact that all the 15 claims were fraudulent acts committed by Manoharan and at the same location. The words 'related acts' in cl 36(k)(ii) of the COI 2006 should therefore be interpreted to include the underlying cause or source or other commonalities underlying the fraudulent acts and embezzlements. The unifying factor was Manoharan, the main perpetrator who had committed all the fraudulent acts and embezzlements at the defendant's PJ branch office. Clause 36(k) of the COI 2006 treats all claims arising from the actions, omissions or misconduct of any one persons or principal perpetrator as being 'one claim'. The 'one claim' clause is essentially an aggregation clause. The claim must be treated as one claim. As the arbitrator's partial award had substantially affected the rights of the plaintiffs, the partial award was set aside in its entirety (see paras 65–66).

[Bahasa Malaysia summary

Defendan adalah firma guaman yang mempunyai pejabat cawangan di Petaling Jaya ('cawangan PJ'). Seorang bernama Manoharan telah diambil bekerja sebagai kerani urusan di cawangan PJ tersebut sehingga ia tutup pada 31 Mac 2007. Plaintif-plaintif ialah penanggung insurans berlesen, yang merupakan penanggung insurans Skim Insurans Perlindungan Profesyen Undang-Undang Malaysia (Skim IPP') bagi tahun 2006 dan 2007. Plaintif kedua ialah penanggung insurans semasa kepada Skim IPP. Melalui kontrak insurans yang terkandung dalam Polisi Utama dan Sijil Insurans ('SI') yang dikeluarkan kepada Majlis Peguam Malaysia untuk dan bagi pihak

ahli-ahlinya, plaintif telah bersetuju untuk memberikan defendan Skim IPP bagi tahun 2006 hingga 2009, bagi melindungi defendan terhadap liabiliti sivil untuk apa-apa tuntutan yang timbul daripada amalan guaman defendan. SI untuk tahun-tahun 2008/2009 mengandungi terma-terma yang mempunyai kesan sama seperti untuk tahun-tahun 2006/2007 pada jumlah maksimum yang mana akan melindungi defendan. Antara Julai 2006 hingga Mei 2009, sejumlah 15 tuntutan telah dibuat terhadap defendan berkaitan penyelewengan atau penipuan yang dilakukan oleh Manoharan. Plaintif-plaintif mempertikaikan 13 tuntutan atas alasan bahawa tuntutan-tuntutan tersebut berkaitan dengan penyelewengan oleh orang yang sama. Oleh itu, tuntutan itu dianggap sebagai 'one claim' menurut fasal 36(k)(ii) SI 2006 dan oleh itu, defendan telah menggunakan had maksimum bagi tahun 2006. Atas alasan bahawa plaintif telah salah menolak liabiliti berhubung baki tuntutan tersebut, defendan telah memulakan prosiding timbang tara menurut fasal 25 SI 2006 terhadap plaintif-plaintif. Ia adalah hujah defendan bahawa meskipun pelaku adalah Manoharan yang sama, hakikatnya mash kekal bahawa penipuan atau penyelewengan telah dilakukan pada pihak-pihak berbeza, oleh itu setiap tuntutan patut dianggap dan diterima sebagai tuntutan berasingan. Penimbang tara berpendapat bahawa ia tidak mencukupi dengan hanya terdapat perbuatan penipuan atau penyelewengan individu yang tidak berkaitan secara berasingan di mana sebab atau sumber yang mungkin sama atau berkaitan. Perbuatan penipuan atau penyelewengan sebenar dengan sendirinya perlu berkaitan bagi tujuan memenuhi fasal itu. Keputusan penimbang tara telah meyebabkan hasil yang berjaya berhubung tuntutan defendan terhadap plaintif-plaintif. Oleh itu, plaintif-plaintif telah memohon untuk merujuk kepada mahkamah ini menurut s 42 Akta Timbang tara 2005 ('Akta tersebut') persoalan-persoalan undang-undang, yang timbul daripada award timbang tara tersebut. Defendan telah membantah permohonan tersebut dengan berhujah bahawa persoalan-persoalan yang dikemukakan bukan persoalan-persoalan undang-undang tetapi sebaliknya merupakan percubaan untuk menyemak semula penemuan fakta dan keterangan yang dibuat oleh penimbang tara.

Diputuskan, membenarkan permohonan dengan kos:

(1) Mahkamah enggan campur tangan dalam award timbang tara. Kes-kes di mana mahkamah menggunakan kuasa campur tangannya telah dengan jelas dihalang sepertimana diperuntukkan dalam s 8 Akta tersebut. Oleh itu, ia hanya dalam kes-kes yang jarang berlaku di mana mahkamah akan campur tangan dalam award timbang tara. Sepertimana dinyatakan dalam ujian berkaitan s 42 Akta tersebut, ia jelas kesilapan undang-undang atau pemakaian salah undang-undang berhubung fakta tersebut yang mewajarkan pembetulan undang-undang. Ini adalah kes di mana hak-hak salah seorang daripada pihak-pihak tersebut telah terjejas oleh keputusan penimbang tara. Oleh demikian, mahkamah dihalang

untuk menggunakan kuasanya bagi melaksanakan kuasanya memperbetulkan kesilapan jelas yang timbul dalam undang-undang (lihat perenggan 63–64).

(2) Penimbang tara telah membuat penemuan fakta bahawa kesemua 15 tuntutan tersebut adalah perbuatan penipuan yang dilakukan oleh Manoharan dan di lokasi yang sama, perkataan-perkataan 'related acts' dalam fasal 36(k)(ii) SI 2006 hendaklah dengan itu ditafsirkan untuk termasuk sebab atau sumber atau kebiasaan lain yang terdapat daripada perbuatan penipuan dan penyelewangan tersebut. Faktor penyatuan adalah Manoharan, pelaku utama yang telah melakukan semua perbuatan penipuan dan penyelewengan di pejabat cawangan PJ defendan. Fasal 36(k) SI 2006 menganggap semua tuntutan yang timbul daripada perbuatan, peninggalan atau salah laku mana-mana orang atau pelaku utama sebagai 'one claim'. Fasal 'one claim' pada dasarnya satu fasal pengagregatan. Tuntutan tersebut harus dianggap sebagai satu tuntutan. Oleh kerana sebahagian daripada award penimbang tara telah menjejaskan hak-hak plaintif-plaintif, sebahagian daripada award itu diketepikan secara keseluruhannya (lihat perenggan 65–66).]

Notes

For a case on question of law, see 1(2) *Mallal's Digest* (5th Ed, 2015) para 1872.

Cases referred to

Axa Reinsurance (UK) Plc v Field [1996] 1 WLR 1026, HL (refd)

Distillers Company Bio-Chemicals (Australia) Pty Ltd, The v Ajax Insurance Co Ltd (1974) 2 ALR 321, HC (refd)

Etherington and Lancashire v Yorkshire Accident Insurance Co, Ltd, Re [1909] 1 KB 591, CA (refd)

Exceljade Sdn Bhd v Bauer (M) Sdn Bhd [2013] MLJU 1202, HC (folld)

Geogas SA v Trammo Gas Ltd, The Baleares [1993] 1 Lloyd's Rep 215, CA (folld)

Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 318, CA (folld)

Kwan Kwok Kwong & Anor v Trenolo Resources Sdn Bhd [2000] 3 MLJ 731, HC (refd)

Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd [2013] 5 MLJ 98; [2013] 8 CLJ 655, HC (folld)

Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd [2003] UKHL 48, HL (refd)

Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman [2010] MLJU 1711, HC (folld)

Majlis Amanah Rakyat v Kausar Corp Sdn Bhd [2009] MLJU 1697; [2009] 1 LNS 1766, HC (folld)

Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd [2009] MLJU 793; [2010] 5 CLJ 83, HC (folld)

Legislation referred to

Arbitration Act 2005 ss 2, 8, 42, 42(1), (1A)

Angela Yap (Leong Wai Hong with her) (Skrine) for the plaintiffs.
Syed Ismit Putra (Kirubakaran and Prakash Lachimanan with him) (Mathews Hun Lachimanan) for the defendant.

Hasnah Hashim J:

[1] Enclosure 1 is the originating summons dated 23 May 2014 by the plaintiffs seeking to refer to this court question of law, arising out of an Arbitration Award dated 8 April 2014 delivered by one, Belden Premaraj ('arbitrator'). The application is made pursuant to s 42 of the Arbitration Act 2005 ('the AA') and states as follows:

(a) That pursuant to section 42(1) of the Arbitration Act 2005, the question of law posed by the Learned Arbitrator at paragraph 89 of the Partial Award dated (On liability) made and published by the Learned Arbitrator, Belden Premaraj on 8.4.2014 and received by the parties on 14.4.2014, namely:-

Hence in the present Clause 36(k)(ii) of Certificate of Insurance 2006 where it does not provide for any further consideration of the underlying cause and instead limits itself to the words 'acts' themselves, can its construction be widened to include the underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts themselves? Can this widening be by implication or by use of the words 'related' before the word 'acts'? be determined as follows:-

(i) The word 'related acts' in 'all claims by one or more claimants that arise from one series of related acts...' in clause 36(k)(ii) of Certificate of Insurance 2006 should be interpreted to include the underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts themselves; or

(ii) The word 'related acts' in 'all claims by one or more claimants that arise from one series of related acts...' in clause 36(k)(ii) of Certificate of Insurance 2006 should be interpreted to include the acts, all fraudulent in nature, by the same perpetrator carried out at one locality namely the Defendant's Petaling Jaya Office when the said perpetrator was the Defendant's Chief Clerk of the Petaling Jaya Office.

(b) That pursuant to section 42(4) of the Arbitration Act 2005, the Partial Award (On Liability) made and published by the Learned Arbitrator, Belden Premaraj on 8.4.2014 and received by the parties on 14.4.2014 be set aside;

(c) Further and/or in the alternative that the Partial Award (On Liability) made and published by the Learned Arbitrator, Belden Premaraj on 8.4.2014 and received by the parties on 14.4.2014 be set aside on the ground that there was an error of law on the face of the award; and

(d) That the costs of and incidental to this application be paid by the Defendant to the Plaintiffs.

[2] The grounds:

(a) determination of the question of law on the 'one claim' standard term clause will benefit the insurance industries in general and the Malaysia Bar Professional Indemnity Insurance Scheme in particular;

(b) determination of the question of law will substantially affect the rights of all the parties;

(c) the question of law was one which the learned arbitrator was asked to determine;

(d) the decision of the learned arbitrator was obviously wrong as the learned arbitrator interpreted the question of law in the negative when it should be in the affirmative; and

(e) the partial award (on liability) at para 90 read with paras 61 and 89 contains an error of law on the face of the award.

[3] The cause papers:

(a) originating summons dated 23 May 2014;

(b) the plaintiffs' affidavit in support affirmed by Aminazwil Azwila bt Amran on 23 May 2014 ('plaintiffs' affidavit in support');

(c) the defendant's affidavit in reply affirmed by K Sila Dass (Susulin @ M Siladoss) on 28 June 2014 ('defendant's affidavit in reply'); and

(d) The plaintiffs' affidavit in reply affirmed by Aminazwil Azwila bt Amran on 18 July 2014 ('plaintiffs' affidavit in reply').

THE PARTIES

[4] The defendant is a legal firm having its main practice in Kluang, Johor. The defendant was founded by K Sila Dass. On 14 April 1994, the defendant set up a branch office in Petaling Jaya, Selangor ('the PJ branch') with Amar Jit Kaur who was the resident partner of the said branch until sometime in 1997. Subsequently the late Cik Azlinda Zakaria became the resident partner of the PJ branch until the aforesaid branch closed on 31 March 2007. At all material times, Manoharan Doraisamy was employed as the managing clerk at the PJ branch.

[5] The plaintiffs are licensed insurers primarily engaged in the business of underwriting of various classes of insurance. The plaintiffs was formerly known as Oriental Capital Assurance Bhd and was the insurers of the Malaysian Bar Professional Indemnity Insurance Scheme ('the PII Scheme') for the year of 2006 and 2007. The second plaintiff is the current insurer to the PII Scheme having taken over from the first plaintiff with effect from year 2008. Jardine Llyod Thompson ('JLT') and Echelon Claims Consultant ('ECC') are the authorised representative of the plaintiffs. The defendant opposed the application contending that the questions posed are not questions of law but amount instead, to an attempt to review findings of fact and evidence made by the arbitrator.

THE QUESTIONS OF LAW

[6] The question of law is in relation to a standard clause form used in all Certificates of Insurance for the years 2006 and 2007 under the Malaysian Bar Professional Insurance Scheme:

(a) whether the construction of cl 36(k)(ii) of Certificate of Insurance 2006 be widened to include the underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts? and

(b) whether the widening by implication or by use of the words 'related' before the word 'acts'?

THE BACKGROUND

[7] By contracts of insurance contained in a master policy and certificate of insurance ('COI') issued to the Malaysian Bar for and on behalf of its members, the plaintiffs agreed to provide the defendant with a professional indemnity insurance for the years 2006 to 2009 ('PII Scheme'), in particular to indemnify the defendant against civil liability for any claim arising from the defendant's legal practice.

[8] The COI for the years 2008/2009 contained terms to the same effect as those for the years 2006/2007. The maximum amount that the defendant will be indemnified for any claim as specified in Item 7 of the schedule for the year 2008 and 2009 will be RM450,000 and RM500,000 respectively (re: cl 6). The base excess specified in Item 10 of the same Schedule for the year 2008 and 2009 is RM17,500 and RM20,250 respectively.

[9] Between July 2006 to May 2009, a total of 15 claims were made by different claimants against the defendant. The claims were all related to the embezzlement or fraud committed by Manoharan, the chief clerk at the defendant's Petaling Jaya branch.

[10] The plaintiffs appointed solicitors and took conduct over the 14 of the 15 claims. The other claim did not go further than a demand. The first of the 15 claims was a claim by one Dr Mahendran made in 2006. On the advice of the first plaintiff (the insurer at that material time) the claim by Dr Mahendran was settled at RM600,750, the defendant contributed a sum of RM50,750 towards the settlement as the base excess and the shortfall of the insured sum of RM550,000 being the mandatory limit of indemnity.

[11] The remaining 13 claims were all contested in courts. The plaintiffs resisted all the said 13 claims. On 17 July 2009 United Overseas Bank (M) Bhd ('UOB') commenced proceedings against the defendant. Judgment was obtained for the sum of RM20,941.06. The first plaintiff lodged an appeal against the said judgment.

[12] By a letter dated 2 April 2010, the plaintiffs through their broker JLT informed the defendant that the 14 claims notified after Dr Mahendran's claim are related to the embezzlement by the same employee. The claim is considered as 'one claim' in accordance with cl 36(k)(ii) of COI 2006 as a result, the defendant has exhausted the mandatory limit for the year 2006. Therefore, there is no available limit for the defendant. The 14 claims relating to the embezzlement by the same employee are treated as 'one claim' together with the claim of Dr Mahendran. The defendant received the letter from JLT and treated it as an expressed intention to repudiate liability.

[13] By a letter dated 26 April 2010, the defendant's solicitors replied to the plaintiffs that the plaintiffs have wrongfully repudiated liability on the remaining 14 claims and instituted the arbitration proceeding pursuant to cl 25 of the COI 2006. The dispute was heard by the arbitrator and by an order No 3 dated 7 September 2012 the arbitrator was to determine liability first before proceeding with the issue of quantum. The main issue before the arbitrator was the interpretation of cl 36(k) of the COI 2006.

[14] The arbitrator made and published his partial award (on liability) on 8 April 2014 and parties received the same on 14 April 2014.

THE CLAIM AGAINST THE DEFENDANT

[15] Between 2006 and 2009, a total of 15 claims were made against the defendant, all in respect of the PJ branch. The claims arose as a result of

embezzlement or fraud committed by person(s) unknown to the defendant and the defendant's chief clerk, Manoharan is suspected to be involved in the same.

[16] The plaintiffs appointed solicitors and took over conduct of 14 of the 15 claims. The other claim did not go further than a demand.

[17] On the advice of the first plaintiff, who was the insurer at the material time, the first claim made by one Dr Mahendran was settled at RM600,750 whereby the defendant contributed a sum of RM50,750 towards the settlement as the base excess and the shortfall of the insured sum of RM550,000. The remaining 13 claims were contested in court and solicitors appointed by the plaintiffs represented the defendant in resisting the said 13 claims.

[18] On or about 17 July 2009, United Overseas Bank (M) Bhd ('UOB') commenced proceedings against the defendant and obtained judgment for the sum of RM20,941.06. An appeal was then lodged by the first plaintiff.

[19] The defendant subsequently received a letter dated 2 April 2010 from the authorised representative of the plaintiffs, JLT, informing the defendant that:

(a) by virtue of the settlement of Dr Mahendran's claim that relates to the embezzlement by the defendant's employee (Manoharan), the defendant has exhausted its base excess of RM550,000 under the policy for the year 2006. As a result there is no available limit for the plaintiff to indemnify the defendant for the remaining 14 claims;

(b) the 14 other claims that relates to the embezzlement by the same employee and are treated as being one claim with the claim by Dr Mahendran in accordance with cl 36(k)(ii) of the certificate of insurance for year 2006; and

(c) the claimants were notified to satisfy and resolve the said 14 claims and all future claims arising from the alleged embezzlement by Manoharan.

[20] Dissatisfied with the position taken by the plaintiffs pursuant to cl 25 of the COI 2006, the defendant referred the dispute to arbitration.

THE ARBITRATION PROCEEDINGS

[21] The dispute was heard by the arbitrator and by the order No 1 dated 7 September 2012, the issue of liability was to be determined first before proceeding with the quantum of damages. The material facts were not in

dispute and the primary issue for determination was the interpretation or construction of cl 36(k)(ii) of the COI 2006.

[22] In the said arbitration proceedings it was agreed by the parties that the issues to be determined are as follows:

(i) Whether all or any portions of the 15 Claims made against the Claimant as shown in Annexure B of the Points of Claim can be construed as 'One Claim' pursuant to the definition of 'One Claim' in the terms and conditions applicable to the Certificate of Insurance 2006?

(ii) In determining question 1 above, did all or any of the 15 claims arise from any embezzlement or fraud committed by the Claimant's former clerk, Manoharan or by persons or persons unknown?

(iii) Who has the burden of proof in determining questions No.1 and No. 2 and on which standard of proof must it be proven?

(iv) Premised on the determination of question 1 above, are the Respondents liable for all or any of the other 14 claims (apart from the 1st claim by Dr. Mahendran a/l Rajaratnam) under the terms and conditions of the Certificate of Insurance 2006 and/or 2007 and/or 2008 and/or 2009?

(v) Whether the settlement of Dr. Mahendran a/l Rajaratnam's claim by the 1st Respondent has exhausted the Claimant's limit or entitlement to be indemnified in respect of the remainder of the 14 claims made against the Claimant?

(vi) In the event the Respondents are not found liable for all or any of the other 14 claims under question 3 and regardless of the same, does the Respondents' conduct as particularized in paragraph 31 of the Points of Claim and/or paragraph 21 of the Points of Defence amount to an acceptance or admission of liability for all or any of the other 14 claims or are the Respondents by such conduct estopped from denying liability for all or any of the other 14 claims?

(vii) Whether the claim notifications lodged in the years 2008 and 2009 shall be treated as one claim based on clause 36(k)(ii) of the Certificate of Insurance 2008?

Only if Parties Choose to make Submissions on this Question including on the Relevancy of this Question

(viii) Whether the claims of the Claimant arise out of misconduct under Clause 33(e) read together with clause 12(e) of the Certificates of Insurance 2006, 2007, 2008 and 2009?

At the end of the oral hearing, it was also agreed by the parties that a further issue to be determined is:-

(ix) Whether the Claimant is entitled to seek joint and several liability against both the Respondents for all its 14 claims (or 13 claims as the case may be since one claim against the Claimant may have been dismissed by the court)?

THE ARBITRATOR'S FINDINGS

[23] The arbitrator made the following findings of fact in his partial award:

(a) I have found that there is a commonality flowing through all the 15 claims in that they were all fraudulent acts or embezzlement perpetrated principally by the same person, Manoharan. I have also found that they were all done whilst he was the Claimant's chief clerk at the PJ Branch and all done in that capacity hence the Claimant's potential liability for such claims. I have also found that they were all done through fraudulent means albeit involving different clients or parties.

(b) With regards to the commonality of the modus operandi for each claim as submitted by the Respondent, I find that their similarity relates to the fact that fraudulent means were used for each claim albeit some were similar than others.

[24] It is the plaintiff's submission that the arbitrator has wrongly answered the question of law.

THE PLAINTIFFS' SUBMISSION

[25] The question of law as set out in the OS is with regards to the construction of cl 36(k)(ii) of the COI 2006. It is submitted by the learned counsel for the plaintiffs that the arbitrator was asked to determine the defendant's claim for indemnity of the 14 claims between the years 2007–2009 pursuant to the PII Scheme. It is contended by the plaintiffs that it should be regarded as one claim with the first claim by Dr Mahendran in 2006.

[26] The arbitrator's decision on the question of law had resulted in the successful outcome of the defendant's claim against the plaintiffs. As a result it had substantially affected the rights of the plaintiffs.

[27] It is the plaintiffs' submission that the arbitrator had erred in law when he interpreted that the words 'related acts' appearing in cl 36(k)(ii) COI 2006 cannot include the underlying cause or source such as the same perpetrator.

[28] It is further submitted that the arbitrator erred in law as his interpretation would render the second limb of cl 36(k)(ii) COI 2006 superfluous and meaningless. The phrase 'related act' should include one human perpetrator whereas 'related matters' or 'transactions' would include

none human commonalities. It is the submission of the plaintiffs that a clause must not be read in isolation but must be considered in the context of the whole document (re: *Kwan Kwok Kwong & Anor v Trenolo Resources Sdn Bhd* [2000] 3 MLJ 731).

[29] Learned counsel for the plaintiffs also referred to the case of *The Distillers Company Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 2 ALR 321 where the court in that case limited the total liability and defined the word 'series' as being 'a number of events of sufficiently similar kind following one another in temporal succession'.

[30] It is the submission of the plaintiffs that all 15 claims constituted 'one claim' as all the 15 claims are similar in nature and have some characteristics in common. The arbitrator in his partial award (re: paras 69 and 70) is of the considered view that:

(a) all 15 claims involved forgeries and fraud;

(b) all 15 claims were committed in the claimant's PJ branch;

(c) Manoharan was the managing clerk; and

(d) all 15 claims were committed by principally Manoharan with others.

THE DEFENDANT'S SUBMISSION

[31] It is the submission of the defendant that it is trite law that in dealing with the interpretation of a policy the term or clause that is ambiguous must be construed against the insurer (*Re Etherington and Lancashire and Yorkshire Accident Insurance Co, Ltd* [1909] 1 KB 591).

[32] It is further submitted that the 15 claims are made by a total of ten different parties. Even if the main alleged perpetrator is the defendant's former employee and the modus operandi of the commission of the offence is similar, the fact remains that the fraud/embezzlement was committed on different parties not related to one another.

[33] Learned counsel in his written submission highlighted that the 15 claims under the COI 2006 did not:

(a) arise from the same act or omission;

(b) arise from one related act or omission;

(c) arise from the same or similar act or omission in a series of related transactions; or

(d) arise from the same transactions.

[34] It is the submission of the learned counsel for the defendant that the definition of 'one claim' found in cl 36(k)(ii) is ambiguous and cannot be construed in favour of the plaintiffs. It is therefore submitted that the contra proferentum rule will apply in that it will not be in favour of the plaintiffs. It is argued by the defendant that the act of embezzlement by Manoharan had caused injury and loss to several parties/clients of the defendant. It is submitted that the claims by affected party ought to be considered and accepted as a separate claim.

[35] Learned counsel for the defendant submitted that this application by the plaintiffs is misconceived as the plaintiffs failed to raise any question of law arising from the partial award. The question at para (1) of the OS did not arise from the partial award but was a question posed by the learned arbitrator in the course of his analysis and findings to determine issue No 1.

[36] It is further submitted that it must be a question arising from the arbitration and not from the partial award. Nevertheless, if this court has a different view of the construction of the said cl 36(k)(ii) it would not suffice for the partial award to be set aside in the absence of illegality or the arbitrator had relied on principles of construction of which the law does not countenance.

[37] The question of law posed by the plaintiffs has been answered correctly by the learned arbitrator after evaluating the facts and evidence as well as case laws. There is nothing at all to suggest that the partial award was guided by misplaced legal proposition and tainted with illegality.

DECISION

[38] Section 42(1) of the AA provides that any party 'may apply to the High Court to determine any question of law arising out of an award'.

[39] Section 42(1A) of the same Act reads:

> The High Court shall dismiss a reference made under sub-section (1) unless the question of law substantially affects the rights of one or more of the parties.

[40] Section 2 of the AA defined 'award' as:

> ... a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders; ...

[41] In the case *Majlis Amanah Rakyat v Kausar Corp Sdn Bhd* [2009] MLJU 1697; [2009] 1 LNS 1766 Justice Ariff Yusoff (as he then was) opined:

A

... the words 'arising out of an award' is a pertinent one. A question of law must arise out of an award, and not out of the arbitration. As such, the jurisdiction conferred on the court should be a limited one, more in line with the jurisprudence on error of law on the face of the award.

B

[42] His Lordship articulately explained the jurisprudence on the error of law on the face of the award:

I share the view the jurisprudence on 'error of law on the face of the award' is very well entrenched in Malaysian law such that any attempt to have it displaced must accordingly find strong statutory authority and rationale. As indicated earlier in this judgment, the Malaysian statutory provision, unlike the UK provision, does not expressly exclude the application of error of law on the face of the award. 'It will be therefore consistent with principle and authority, and consistent as well with established principles of statutory interpretation, for this court to agree with the view taken by the defendant. Further, I have taken note of the New Zealand equivalent statutory provisions and their subsequent amendments, such that it will be fair to conclude that short of an express statutory amendment, it will be too drastic and unwise for this court to adopt the position taken by the plaintiff. Briefly put, the established jurisprudence and current statutory provision cannot simply allow the court to reverse the entire jurisprudence on 'error of law on the face of the award.'. It may be that over time and through the gradual interpretative process reflective of the common law method and tradition, the technical rigours of this particular law (such as the need, for instance, of having a clear proposition of law on which the award depends evident in the award itself) might in particular cases be loosened (pp 336–337 of the report).

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[43] In *Exceljade Sdn Bhd v Bauer (M) Sdn Bhd* Nallini J (now JCA) was of the view that the test should not be extended to s 42 of the AA. Her Ladyship explained in her grounds of judgment that:

Under the previous s 24 of the repealed Arbitration Act 1952, the test for setting aside awards under the section was whether an error of law on the face of the record arose ... That section being repealed, it would follow that the test previously applied in respect of the repealed s 24 ought not logically be extended or utilised in respect of the new s 42 of the Arbitration Act 2005 (para 51 of the judgment).

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A comparison of the two sections, namely s 24 of the repealed Arbitration Act 1952 and the present s 42 are quite evidently different and distinct. Section 42 allows 'any question of law arising out of an award' to be brought by 'any party' by way of a reference to the High Court. Given the clearly wider ambit of this section, as compared to the prior s 24 of the repealed Arbitration Act, it is evident that the question that a court needs to ask itself is whether the question framed before it is indeed a question of law (para 54).

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[44] Any party may refer to the High Court any question of law arising out of an award pursuant to s 42 of the AA. The High Court shall dismiss a reference made under sub-s (1) unless the question of law substantially affects the rights of one or more of the parties. Similarly in the instant case before this

court, the question of law for determination arises out of the partial award. The learned arbitrator having posed the question of law had came to his decision.

[45] In considering a reference of question of law pursuant to s 42 of the AA, I am guided by the principles enunciated in the following cases:

(a) the question of law must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2009] MLJU 793; [2010] 5 CLJ 83; *Maimunah bt Deraman (practising as an architect under the name of D' Mai Architect) v Majlis Perbandaran Kemaman* [2010] MLJU 1711);

(b) the grounds in support must also be stated on the same basis;

(c) the question of law must arise from the award, not the arbitration proceeding generally (*Majlis Amanah Rakyat v Kausar Corp Sdn Bhd*, *Exceljade Sdn Bhd v Bauer (M) Sdn Bhd*);

(d) the party referring the question of law must satisfy the court that a determination of the question of law will substantially affect his rights;

(e) the question of law must be a legitimate question of law, and not a question of fact 'dressed up' as a question of law (*Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Lloyd's Rep 215);

(f) the court must dismiss the reference if a determination of the question of law will not have a substantial effect on the rights of parties (*Exceljade Sdn Bhd v Bauer (M) Sdn Bhd*);

(g) this jurisdiction under the said section should be exercised only in clear and exceptional cases (*Lembaga Kemajuan Ikan Malaysia v WJ Construction Sdn Bhd* [2013] 5 MLJ 98; [2013] 8 CLJ 655);

(h) the intervention by the court must only be if the award is manifestly unlawful and unconscionable;

(i) the arbitral tribunal remains the sole determiners of questions of fact and evidence (*Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318); and

(j) while the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse.

[46] The arbitrator in his partial award (re: para 89) had posed the following question of law:

> Hence in the present Clause 36(k)(ii) of Certificate of Insurance 2006 where it does not provide for any further consideration of the underlying cause and instead limits itself to the words 'acts' themselves, can its construction be widened to include the

underlying cause or source such as the same perpetrator or other commonalities which are underlying the fraud or embezzlement acts themselves? Can this widening be by implication or by use of the words 'related' before the word 'acts'?.

The arbitrator in his partial award had answered the aforesaid question of law in the negative.

[47] Guided by the authorities stated above, this court must examine the primary clause in dispute between the parties to the arbitration to determine the question of law referred to this court.

[48] The COI for 2006 and 2007 is part of the PII Scheme for the years 2006–2007. Clause 6 of the COI provides that the maximum amount that the defendant as a claimant will be indemnified for any one claim is the amount as specified in Item 7 of the Schedule. The amount specified is RM550,000. According to cl 8, the liability applies to the part of any claim which now exceeds the base excess specified in Item 10 of the Schedule. The base excess sum which is to be borne by the defendant is RM45,000.

[49] Clause 36(k) of the COI 2006 defines 'one claim' as:

(a) All claims by one or more claimants that arise from the same act or omission or from a series of related acts or omissions;

(b) All claims by one or more claimants arising from one matter or transaction;

(c) All claims arising out of misconduct of one person acting alone or in collusion with others shall be regarded as attributable to one underlying cause and accordingly deemed to constitute one claim;

(d) Otherwise each claim will be regarded as one claim.'.

[50] Clause 6 of the COI 2006 stipulates as follows:

The maximum amount we will indemnify you for any one claim is the amount specified in Item 7 of the schedule ...

[51] Item 7 of the Schedule provides that the:

Mandatory Limit of Indemnity: RM550,000.00 (each and every claim).

[52] Clause 38(ii) provides:

(ii) all claims by one or more claimants that arise from one series of related acts or omissions or from the same or similar act or omission in a series of related matters or transactions; ...

[53] The learned arbitrator in his partial award came to the conclusion that there exist a commonality in all the 15 claims as the fraudulent acts or embezzlement were committed by the same person and committed at the same branch law office of the defendant. The acts were all committed through fraudulent means involving different collaborators.

[54] The arbitrator is of the view that it was not sufficient for there to be a separate unrelated individual acts of fraud or embezzlement where the underlying cause or source may have been the same or related. The actual fraud or embezzlement acts themselves must be related in order to satisfy the clause (re: para 96 of his partial award). The unifying factor of a grand scale fraud or embezzlement was part and parcel of the scheme. In para 100 of his award he held:

> ... that the proper and reasonable construction of the first limb in clause 36(k)(ii) of the Certificate of insurance 2006 is that the several claims by the same or different claimants may be treated as one Claim only if all the fraudulent or embezzlement acts formed a single series of related fraud or embezzlement acts which taken as a whole can give rise to 15 claims.

[55] Whether there is only one single event or series of events in a given situation depends very much on the facts of the case. It is also dependent on the precise wording of the clause. Therefore, in construing the terms of the insurance policy, words used must be interpreted in their plain and ordinary meaning.

[56] A provision in an insurance policy must not be read in isolation of the other terms in the said policy. In the instant case, the acts were all committed by one common person, that is, Manoharan. The series of events that followed were all similar in nature, ie having the same ingredients,

(a) fraud;

(b) forgeries;

(c) committed by the same person; and

(d) all at the same branch.

[57] Clause 36(k)(ii) of the COI must be interpreted to include the underlying cause such as the same perpetrator and other common factors underlying the fraudulent acts committed. When there is a limit on the amount recoverable by an insured for an event, the courts must firstly determine whether the loss suffered by an insured arose from one event or several events. This would be largely questions of facts. The House of Lords in *Axa Reinsurance (UK) Plc v Field* [1996] 1 WLR 1026 decided that losses

arising out of one event referred to something which took place at a particular place and in a particular way.

[58] The said cl 36(k)(ii) is also described or known as an aggregation clause and depending on the policy, may work in favour or against the insured. In *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48 Lord Hoffman explained that 'The unifying factor is often the common origin in some act or event specified by the clause. But much will turn upon the precise nature of the act or event which, for the purposes of aggregation, the clause treats as a unifying factor'.

[59] Lord Hoffman proceeded to explain 'related acts':

> Suppose a 'consultant' prepares a document which misrepresents the merits of the pension scheme he is endeavouring to sell and gives that document to a succession of people; the people who buy into the scheme as a result of having been given the misleading document by the 'consultant' could each have a claim against the assured employing that 'consultant'. Each act of giving the misleading document to a person would be a distinct act. But they could together form a 'related series of acts' from which a 'series of third party claims' had resulted.

[60] It is the learned arbitrator's findings '... that all of the 15 claims arose from the fraud or embezzlement principally committed by the claimant's former clerk, Manoharan'. He also held '... other persons were working in collaboration.... extent of their involvement is not pertinent ...' (para 54 partial award).

[61] In the case before this court the unifying factor is Manoharan who had committed the fraud and embezzlement in a series of transaction.

CONCLUSION

[62] The court is reluctant to intervene in arbitration awards. The cases in which the court exercises its powers of intervention are expressly restricted as provided in the Act (s 8 of the AA). As such it is only in rare cases that the court will intervene in an arbitration award. As set out in the test in relation to s 42 of the AA, a clear error of law or misapplication of the law to the fact warrants a rectification of the law. The instant case is a case where the rights of one of the parties, has been substantially affected by the decision of the arbitrator.

[63] This, therefore, is one of the rare cases where the court is constrained to exercise its power to correct the clear errors of law arising. It must be emphasised that this court has not sought to interfere nor invoke its discretion in relation to any questions of fact.

[64] This court considered the written submissions together with the authorities submitted and is of the considered view that the learned arbitrator did not answer the question of law correctly. The learned arbitrator had made a finding of fact that all the 15 claims were fraudulent acts committed by Manoharan (para 54 of the partial award). All the claims are related series of act committed by one person and at the same location.

[65] The words 'related acts' in cl 36(k)(ii) of the COI 2006 should therefore be interpreted to include the underlying cause or source or other commonalities underlying the fraudulent acts and embezzlements. In this case the unifying factor is Manoharan, the main perpetrator who had committed all the fraudulent acts and embezzlements at the defendant's PJ branch office. Clause 36(k) of the COI 2006 treats all claims arising from the actions, omissions or misconduct of any one persons or principal perpetrator as being 'one claim'. The 'one claim' clause is essentially an aggregation clause. This claim must therefore be treated as one claim:

(a) 'series' appearing in cl 36(k)(ii) of the COI 2006 means acts or events that are similar in nature or have a characteristic in common; and

(b) 'related' acts means correct acts.

[66] As the partial award has substantially affected the rights of the plaintiffs, the partial award is set aside in its entirety pursuant to s 42 of the AA. Based on the reasons mentioned above, the application made pursuant to s 42 of the AA is allowed with costs.

Appeal allowed with costs.

Reported by Afiq Mohamad